24(2), directing him to serve the requisite notice on the employer and the applicant in this Originating Motion. There will be no order as to costs.

Order accordingly.

Solicitors: *Murphy & Dunbar.*

A MALAYSIAN REPORTS

HAMZAH BIN ABDUL MAJID & ANOR. v. SUNGEI WAY LEASING SDN. BHD.

[S.C. (Seah, Syed Agil Barakbah & Wan Hamzah S.C. JJ.) April 22 & October 26, 1985]

B

[Kuala Lumpur – Federal Court Civil Appeal No. 275 of 1984]

Practice and Procedure – Summary Judgment by Registrar – Appeal dismissed by Judge in Chambers – No application made for further argument in open court C *within time limited – Appeal not properly brought – R.H.C. 1980, O.14 & O.56 r.2 – R.S.C. 1980, r. 56 – Court of Judicature Act, 1964, s.68(2).*

In this case summary judgment had been given by the Registrar. The appeal was dismissed by the High Court in Chambers. No application was made for the further argu- D ment in open court, orally or within four days from the day of the order. A written application was made subsequently and the learned Judge certified that he did not require further argument.

Held: the appeal had not been properly brought and should therefore be struck out.

E

[*Editorial Note:* The present case seems to indicate that the appellants, even if they had failed to appeal within the time and manner prescribed, may appeal to the Supreme Court under R.S.C. 1980, Rule 56 for leave if they can show merits in their appeal.]

Cases referred to:

F

(1) *Ng Cheng Yoon* v. *Mah binti Mat Isa* [1981] 1 M.L.J. 218.
(2) *Seldon* v. *Wilde* [1910] 2 K.B. 9; [1911] 1 K.B. 701
(3) *Arumugam Pillai* v. *Government of Malaysia* [1980] 2 M.L.J. 283.
(4) *Tara Rajaratnam* v. *Datuk Jaginder Singh & Ors.* G [1981] 1 M.L.J. 97.
(5) *Ratnam* v. *Cumarasamy* [1965] 1 M.L.J. 228.

HIGH COURT.

R.D. Rajasingam for the plaintiff.
H *S.L. Lai (Miss)* for the defendants.

Abdul Razak H.: Permohonan ini ialah ulang bicara atas keputusan yang telah dibuat olih Penolong Kanan Pendaftar memerintah pihak pemohon (applicant) membayar wang sebanyak I $73,449.53 sen sebagai kerugian yang ditimpanya setelah trailer yang disewa-belikan (Hire-purchased) kepada pihak pemohon itu bertemu dengan suatu nahas dan menimpa kerosakan. Kenyataan tuntutan (statement of claim) pihak menentang (respondent) itu menyatakan bahawa adalah perjanjian antaranya dengan pihak pemohon, iaitu pihak

kena tuntut, bahawa yang disebut kemudian hendaklah mengambil insuren menjamin jentera itu daripada segala kemalangan. Adalah juga disyaratkan bahawa pihak pemohon tidak bolih menyalahgunakan jentera itu (use for an unlawful purpose).

Pihak pemohon telah mengambil suatu insuren dengan Syarikat General Accident Assurance Corporation dengan mana adalah disyaratkan bahawa orang lain tidak dibenarkan menggunakan jentera itu untuk perniagaannya tanpa kebenaran pihak insuren. Meskipun begitu, pihak pemohon telah membenarkan sebuah syarikat bernama Pengangkutan Terasik menggunakan untuk perniagaannya diwaktu mana kemalangan yang dinyatakan telah berlaku.

Setelah tuntutan itu dibuat pihak menentang telah membuat permohonan di bawah Perintah 14 Kaedah Mahkamah dihadapan Penolong Kanan Pendaftar supaya hukuman dijatuhkan ke atas pihak pemohon, dan telah dibenarkan. Di dalam permohonannya untuk mengenepikan hukuman itu dihadapan saya pihak pemohon di dalam affidavitnya berkata bahawa permohonan itu seharusnya dibenarkan kerana ia telah menuntut pihak insuren menanggung kerugian yang dituntut olih pihak menentang tetapi telah ditolak, dan telah seterusnya mengambil tindakan pihak ketiga (Third party action) terhadap insuren berkenaan. Seterusnya pihak insuren telah memohon ke Mahkamah di bawah perjanjiannya dengan pihak pemohon supaya membawa persengketaan itu ke pangkuan timbangtara (Arbitration) dan dibenarkan. Olih yang demikian katanya tuntutan itu seharusnyalah ditangguhkan hingga keputusan timbangtara itu dicapai.

Saya berpendapat, sebaliknya, tidak ada sebab tuntutan pihak menentang itu mesti ditangguhkan sehingga selepas timbangtara itu diadakan, kerana perbalahan di bawah timbangtara itu ialah antara pihak insuren dengan pihak pemohon sahaja tidak melibatkan pihak menentang, sambil tuntutan disini adalah di antara pihak pemohon dengan pihak penentang, dan tidak akan menjejas (affect) kedudukan pihak pemohon ditimbangtara itu nanti. Kalau ia kalah disini itu tidak akan membendung (jeorpadise) haknya memperolihi segala bayaran ditimbangtara itu. Kalau ia menang, itu juga tidak akan menipiskan (reduce) harapannya (chances) nanti. Pada muktamadnya ia tidak akan menanggung apa-apa kerugian, semacam mana yang akan ditanggung olih pihak menentang, jika perbicaraan atas tuntutannya itu tidak dilangsungkan sekarang, kerana, sudah tiga tahun lamanya ia dibuat tetapi keputusan masih belum dijatuhkan. Pada satu ketika, permohonan di bawah Perintah 14 itu telah ditetapkan dibicara pada Januari 21, 1982, tetapi telah ditangguhkan atas permintaan pihak pemohon dan setelah lebih dua tahun lamanya baharu dibicarakan pada Februari 17, 1984. Pada pendapat saya penangguhan-penangguhan lagi akan hanya melakukan kezaliman (injustice) dan kesusahan kepada pihak menentang sahaja yang tidak seharusnya berlaku.

Pada pendapat saya adalah jelas bahawa pihak pemohon harus menanggung kerugian atas apa yang telah berlaku kerana kesalahannya tidak mematuhi syarat-syarat perjanjian, di antaranya dengan pihak menentang yang tegas menyatakan, di bawah syarat 8(j), bahawa jentera itu tidak bolih digunakan bagi perkara-perkara yang salah. Di dalam policy insurance itu adalah dinyatakan bahawa pihak pemohon tidak bolih meminjamkan jentera itu kepada orang asing melainkan atas urusan pihak pemohon dan pemandunya hendaklah pekerjanya sendiri, *dan* membawanya dengan arahan pemohon atau dengan keizinannya, tetapi tiada bukti menunjukkan hal-hal ini telah berlaku. Apa yang cuma telah dikatakan di dalam kenyataan pembelaan itu ialah bahawa pihak menentang telah melanggar seksi 4, 5, 6 Undang-Undang Sewa-Beli 1967, tetapi bagaimanakah ini berlaku tidak pula dinyatakan, malahan peguam bagi pihak pemohon tidak menyebut sepatah kata pun dihadapan saya bagaimana seksyen-seksyen itu telah dilanggar.

Saya memutuskan, olih itu, bahawa permohonan ini ditolak dengan kosnya dibayar olih pihak pemohon.

Permohonan ditolak.

Peguamcara: *Lewis & Co.; K.P. Woon & Co.*

[From the above judgment the defendants appealed to the Supreme Court.]

SUPREME COURT.

G.C. Proctor for the appellants.
R.D. Rajasingam for the respondent.

Cur. Adv. Vult.

Syed Agil Barakbah S.C.J. (delivering the Judgment of the Court): This was an appeal against the decision of the High Court Judge, Kuala Lumpur, who dismissed the appeal in Chambers against the decision of the Registrar who gave judgment against the appellants on an application for summary judgment under Order 14 of the Rules of the High Court 1980 at the instance of the respondent. Before us counsel for the respondent raised a preliminary objection on the ground that the appellants had failed to apply for further argument in open Court within the prescribed time under Order 56 rule 2(2) of the Rules of the High Court 1980. In the circumstances, the appeal was not properly brought before the Court and should be struck out. According to the sequence of events as shown in the appeal record, no oral application was made after the learned Judge had dismissed the appeal. The Order of the High Court was subsequently issued on October 9, 1984. A written application dated November 2, 1984 was made under Order 56 rule 2(2) and the learned Judge issued a certificate dated November 6, 1984 that he did not require any further argument in open Court in respect of the said Summons-in-Chambers. It was submitted that the said certificate was issued by the learned Judge on an application made well out of the time by about twenty days.

Order 56 rule 2(2) states:

"Any party dissatisfied with any order made by a Judge in Chambers may apply, at the time the order is made, orally or at any time within four days from the day of the order in writing to the Registrar, for the adjournment of the matter into Court for further argument, and on such application, the Judge may either adjourn the matter into Court and hear further argument, or may certify in writing that he requires no further argument. If the Judge hears further argument, he may set aside the order previously made and make such other order as he thinks fit."

It is clear therefore that the application was made out of time and we are of the view that had the learned Judge been aware of the defect he would not have issued the certificate.

The matter regarding the right of appeal to the Supreme Court against an order of a High Court Judge made in Chambers is governed by section 68(2) of the Court of Judicature Act 1964 (the Act) which states:

"No appeal shall lie from an order made by a Judge of the High Court in Chambers unless the Judge has certified, after application, within four days after the making of the order by any party for further argument in Court, that he requires no further argument, or unless leave is obtained from the Supreme Court or from a Judge of the High Court."

The respondent relied on the Federal Court decision in *Ng Cheng Yoon* v. *Mah binti Mat Isa*[1] in support of their contention that the rule applied only to an interlocutory order and not to a final order of the Judge in Chambers. The judgment in that case relates to specific performance of an agreement for sale of land and was therefore a final judgment. Similarly, in the present appeal, the Registrar's order made under Order 14 of the Rules of the High Court 1980 was also final. Since that case however, section 68(2) has been amended by the deletion of the word "interlocutory" before the word "order" with effect from February 23, 1982 (see Act A530). As a result of the amendment, we are of the opinion that the word "order" in Order 56 rule 2(2) of the Rules of the High Court 1980 includes an interlocutory as well as a final order of the High Court Judge made in Chambers. The decision in *Ng Cheng Yoon's* case is no more applicable. We hold that section 68(2) applies to the instant case.

It was further submitted that the word "order" in section 68(2) cannot refer to "judgment" since section 68(1)(b) and (c) distinguishes between judgment and order. We do not see any merit in this argument. Unlike subsection (1)(a) and (b) which refer to matters that are non-appealable, subsection (2) refers to a decision of a Judge in Chambers against which an appeal may be brought if certain conditions are fulfilled. We do not think that the omission of the word "judgment" in subsection (2) of the Act is intended to lay a distinction with the word "order" which appears therein. To construe in the sense contended by the learned counsel for the respondent would give rise to great difficulties which the Judicature Act has put an end to (see *Seldon* v. *Wilde*[2]). We hold the view that the word "order" in subsection (2) includes a judgment or any decision of a Judge made in Chambers. We are satisfied that the application to the Judge was well out of time.

It has been urged upon us to consider granting leave under section 68(2) of the Act even though no formal application has been made. So far no leave appeared to have been obtained from a Judge of the High Court or from us as required under the second limb of sub-section (2). In support of their proposition, the appellants relied on two decisions of the Federal Court, *viz.*, *Arumugam Pillai* v. *Government of Malaysia*[3] and *Tara*

Rajaratnam v. *Datuk Jaginder Singh & Ors.*[4] In the first case, the application for leave of the Federal Court without first applying for leave of the High Court was made on the suggestion of the Court itself which granted such leave to the appellant and proceeded to hear the appeal. In the second case, there was an application by the respondents to dismiss the appeal on three grounds. The appellant applied for amendment of the notice of appeal and memorandum of appeal to comply with the Rules seeking to overcome two of the prayers in the respondents' application. It is clear in both cases there were merits in the appeal which enabled the Court to exercise its unfettered discretion to proceed. In the present appeal however, there was no formal application and no submissions on the merits were made to us. Although in their written submission (which was never asked for) the appellants put forward certain propositions in their endeavour to show special grounds, they are intended to be in support of an extension of time to appeal under Rule 56 of the Rules of the Supreme Court 1980. An application for leave to appeal has to be properly brought before us and the respondent's counsel has to be given the opportunity of replying on the point. There must be material upon which we could exercise our discretion (see *Ratnam* v. *Cumarasamy & Anor.*[5]).

In the circumstances, we agree with the preliminary objection and hold that the appeal has not been properly brought before us.

Be that as it may, the appellants have not formally exhausted their remedies to apply for leave to appeal under the second limb of section 68(2) of the Act. Since the period of one month to appeal has lapsed, the application should now be made to the Supreme Court in compliance with Rule 56 of the Rules of the Supreme Court 1980. In the circumstances, the appeal is struck out with costs without prejudice to the appellants filing a proper application.

Order accordingly.

Solicitors: *K.P. Woon & Co.; Lewis & Co.*

TEOH SENG LIAN v. PUBLIC PROSECUTOR

[S.C. (Abdul Hamid C.J. (Malaya), Syed Agil Barakbah & Wan Hamzah S.C. JJ.) July 22 & November 4, 1985]

[Ipoh – Supreme Court Criminal Appeal No. 50 of 1984]

Criminal Law and Procedure – Charge of murder – Trial by jury – Defence of grave and sudden provocation and self-defence – Jury not told that if the exercise of right of self-defence is in excess of power given by law accused may be convicted of culpable homicide – Sudden fight – Defences not put to jury – Penal Code (Cap. 45), s. 300, Exceptions 2 & 4.

Penal Code, s. 300, Exceptions 2 & 4 – Murder – Defence of grave and sudden provocation and self-defence.

In this case the appellant was charged with murder. There had been a business misunderstanding between the appellant and the husband of the deceased. The defence evidence showed that when the appellant asked for a loan of money from the deceased she refused, scolded and chased him, hitting him with a broom and then throwing a knife at him. The knife missed him and fell to the ground. Both went for the knife but the appellant gained possession of it and slashed her. When she fell on the ground, he picked a stone and hit her on the head. At the trial with a jury, only two types of defence were brought to the attention of the jury by the judge, *viz.*, the exercise of the right of self-defence and whether there was grave and sudden provocation. The jury returned a majority verdict of guilty by 5 to 2. The appellant appealed.

Held: (1) a judge sitting with a jury must put to them any defence available on the evidence irrespective of whether or not reliance has been placed on that defence at the trial or whether or not it has been mentioned by the counsel at the trial. The way in which it is to be complied with is a matter for the trial judge to decide basing on the actual evidence adduced at the trial;

(2) in this case the trial judge's direction to the jury on the law relating to the right of private defence was sketchy and inadequate as to enable them to fully understand the law and appreciate the principles relating to self-defence. He also did not explain Exception 2 of section 300 of the Penal Code. This non-direction was fatal to the defence case on the ground that the jury being laymen were not made aware of the legal principle that while the proper exercise of self-defence by the accused in causing the death of the attacker does not amount to any criminal offence, the exercise of such right in excess of the power given by the law which results in the death of the opponent does not amount to murder if exercised in good faith and under the circumstances stated in the Exception but amounts to culpable homicide not amounting to murder. There was a failure to direct the jury on an essential point and the non-direction has occasioned a failure of justice;

(3) in this case it was the duty of the trial judge to have invited the attention of the jury to Exception 4 to section 300 of the Penal Code and explain to them the principle applicable thereto. In Exception 4 notwithstanding that a blow has been struck or provocation given in the origin of the dispute, it is the subsequent conduct of the parties which puts them upon equal footing in respect of guilt that is material. It should then be left to the jury to consider